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No. 99-1285

IN THE

Supreme Court of the United States

SUSAN A. DESIDERIO,
Petitioner,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE CASE

The petitioner, appellant below, is Susan A. Desiderio. The respondent, appellee below, is the National Association of Securities Dealers, Inc., referred to herein as the "NASD." Pursuant to this Court's Rule 29.6, the NASD states that it has no parent companies and no public shareholders.

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RESPONDENT'S BRIEF IN OPPOSITION

As petitioner herself emphasizes, this is a "fact-based challenge" to the National Association of Securities Dealers ("NASD") arbitration process. Pet. 4. By itself, this would ordinarily be grounds for denying certiorari. But this fact-based challenge is especially inappropriate for review because it rests on facts that are no longer operative. The court below was correct when it held that mandatory arbitration of Title VII claims under 1996 NASD rules and procedures was consistent with Title VII and the Constitution. Since that time, however, the NASD has both excepted Title VII claims

from its mandatory arbitration rule and significantly modified the procedures that govern arbitration of statutory discrimination claims. Petitioner's arguments about 1996 rules and procedures are no longer relevant, and raise no question of continuing importance.

STATEMENT OF THE CASE

A. THE NASD.

The NASD is a private not-for-profit corporation organized under the laws of Delaware, and a self-regulatory organization registered with the Securities and Exchange Commission ("SEC") as a national securities association. *See* 15 U.S.C. §78o-3, *et seq.* (amending the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78a, *et seq.*); *see also United States v. NASD*, 422 U.S. 694 (1975); Pet. App. 2a-3a.[1] The government provides no funding to the NASD, and government officials neither appoint the NASD's members nor serve on any NASD board or committee. *Id.* at 15a. The function of the NASD is to regulate the over-the-counter securities market, and the securities firms and their registered representatives who buy and sell over-the-counter securities. 15 U.S.C. §78o-3; *Datek Securities Corp. v. NASD*, 875 F. Supp. 230, 232 (S.D.N.Y. 1995). All of the NASD's rules and regulations, including those relating to registration of securities representatives and arbitration, must be approved by the SEC. *Shearson/American Express v. McMahon*, 482 U.S. 220, 235 (1987).

B. SECURITIES INDUSTRY REGISTRATION REQUIREMENTS AND THE OBLIGATION TO ARBITRATE.

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[1] The abbreviation "Pet. App." is used throughout to refer to the appendix to the petition for certiorari. References to "JA" are to the joint appendix filed below.

The NASD is required to maintain records regarding its member securities firms and their registered representatives, including records related to employment of registered representatives. 15 U.S.C. §78q(a); 17 C.F.R. §§240.17a-1, 17a-3 & 17a-6. Pursuant to its authority under section 15A(g)(3)(B) of the Exchange Act, 15 U.S.C. §78o-3(g)(3)(b), the NASD has established standards for the uniform licensing and registration of securities professionals. *Meyers v. NASD*, No. 95 CV 75055, 1996 U.S. Dist. LEXIS 6044 at *2 (E.D. Mich. March 29, 1996). The SEC has approved the Form U-4, Uniform Application for Securities Industry Registration or Transfer, for use in registering securities industry representatives. The Form U-4 must be filed by a securities firm whenever it employs a registered representative. NASD By-Laws, Art. IV, Section 2(a). JA 34.[2] *See also Meyers,* 1996 U.S. Dist. LEXIS, at *3.

By signing the Form U-4, the registrant agrees to comply with all of the rules and regulations of the organization or organizations with which he or she seeks to register. Additionally, the registrant agrees to the following provision:

> (5) I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

See Exhibit A to Complaint, JA 30. *See also Gilmer v. Interstate/Johnson-Lane Corp.*, 500 U.S. 20, 23 (1991) (compelling arbitration of Age Discrimination in Employment Act ("ADEA") claim pursuant to Form U-4 agreement).

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[2] All of the NASD By-Laws and Rules cited herein are published in the NASD Manual (CCH).

The NASD[3] operates an arbitration forum for resolution of disputes between securities brokers and their firms, as well as other disputes. Former NASD Rule 10201 – effective at the time Desiderio's dispute arose – provided that employment disputes between associated persons and securities firms were arbitrable in this forum at the instance of either party. JA 43. This provision, incorporated by reference into the Form U-4 under the language quoted above, is at the core of petitioner's lawsuit.

In October of 1997, however, the NASD decided that it would no longer require mandatory arbitration of statutory discrimination claims, and filed a proposal to change its rules accordingly. Following publication for comment in the Federal Register, the SEC approved the NASD's rule proposal on June 22, 1998, effective for claims filed on or after January 1, 1999. Rel. No. 34-40109 (June 22, 1998), 63 Fed. Reg. 35299 (1998). The text of amended Rule 10201 reads as follows:

> (b) A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute *is not required to be arbitrated.* Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose.

Brief of Appellees NASD and SEC, Addendum (emphasis added). Effective January 1, 1999, no NASD rule requires arbitration of statutory employment discrimination claims.

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[3] The arbitration forum and registration process are operated by NASD Regulation, Inc., a wholly owned subsidiary of the NASD. The Board of Directors of NASD Regulation, Inc., is comprised of 50 percent "non-industry" directors – that is, persons who are not affiliated with the securities industry. The arbitration program is overseen by the National Arbitration and Mediation Committee (NAMC), which is composed of a majority of non-industry members. The 1997 roster of the NAMC is at JA 35.

C. NASD ARBITRATION PROCEDURES.

Arbitration proceedings in the NASD forum are governed by the Code of Arbitration Procedure ("NASD Code"), which has been approved by the SEC. *McMahon*, 482 U.S. at 234.

1. *Desiderio-Era Rules*

At the time Desiderio's dispute arose in 1996, the NASD Code contained several protections for litigants against the possibility of bias in the arbitration process. Under the arbitration rules then applicable, a majority of arbitrators hearing Desiderio's putative employment discrimination claims would have been "public" arbitrators, neither employed by nor otherwise affiliated with the securities industry. JA 41-42, 50. Prior to final arbitrator selection, the NASD provided parties with the proposed arbitrators' names and employment histories for the last 10 years. Rule 10310, JA 51. Arbitrators were (and still are) required to provide timely and ongoing disclosures of "any circumstance which might preclude such arbitrator from rendering an objective and impartial decision." Rule 10312(a), JA 52. The parties also were and are permitted to request the disclosure of additional information regarding the arbitrators. *Id.*

This disclosure assisted parties or counsel in making informed decisions about whether to challenge the appointment of arbitrators. Parties were entitled to one peremptory challenge as of right and unlimited challenges for cause to remove an arbitrator from a panel. Rule 10311, JA 51-52. The same rule permitted the Director of Arbitration, in his discretion, to grant additional peremptory challenges in the interests of justice. *Id.* Rule 10312(d) also permitted the Director of Arbitration himself, prior to the first hearing in the case, to remove an arbitrator based on the information disclosed, or to inform the parties of relevant disclosed information if the Director did not remove the arbitrator. JA 52.

2. *Post-1996 Rule Changes*

Since the time of Desiderio's 1996 dispute, the NASD has made significant changes to the arbitration procedures that govern statutory discrimination claims voluntarily submitted to NASD arbitration. Most of these changes are the result of a comprehensive proposal by the NASD, approved by the SEC on October 27, 1999, and effective on January 18, 2000. Exchange Act Rel. No. 34-42061 (Oct. 27, 1999), 64 Fed. Reg. 59815 (1999).[4] All of the rule changes are designed to enhance protections for employees in the arbitration process. The changes most relevant here are as follows:

• Arbitrator qualifications: Only "public" arbitrators (arbitrators not affiliated with the securities industry) are eligible to hear statutory discrimination claims. Additionally, the chairperson of a panel hearing such a claim must have a law degree, membership in a state bar, substantial familiarity with employment law and 10 or more years legal experience, and cannot have spent more than 50 percent of his or her time representing the views of employers or employees within the last five years. *See* Rule 10211.

• Arbitrator selection: Rather than being presented with a proposed panel of arbitrators, parties are now permitted to select their own arbitrators from a rotating list of names. *See* Rule 10310. Parties receive lists of potential arbitrators, complete with employment and professional backgrounds, and may strike the names of arbitrators they do not want to hear their cases and rank the remaining arbitrators in order of preference. This new selection procedure results from a separate 1998 change to NASD rules, and applies to all NASD arbitrations. *See* Rule 10308.

• Discovery: Parties in statutory discrimination cases are

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[4] The text of the relevant 1999 amendments appears in an appendix to this brief.

specifically permitted to take pre-hearing depositions, as well as to avail themselves of the other forms of discovery already available under the NASD Code. *See* Rule 10213.

• Arbitration awards: Arbitrators hearing statutory discrimination claims may award any relief available in a court. Each arbitral award must include a written summary of the issues presented, description of the type of dispute and the damages or other relief requested or awarded, and a statement regarding the disposition of any statutory claims. *See* Rule 10214.

• Attorneys' Fees: Arbitrators in statutory discrimination cases may award reasonable attorneys' fees in accordance with applicable law. *See* Rule 10215.

D. PETITIONER'S DISPUTE AND THE PROCEEDINGS BELOW.

On March 18, 1996, Desiderio was hired by SunTrust Bank in Florida as a registered securities representative. As a condition of employment, Desiderio was required to register with the NASD and to execute a Form U-4. Pet. App. 2a. Desiderio signed the Form U-4, but crossed out the provision in the Form, *supra* at 3, in which she would have agreed to arbitrate disputes with her employer under the rules of the NASD. *Id.* at 25a-26a. Although SunTrust was, according to Desiderio, prepared to accept the Form as altered, Desiderio alleges that an unidentified person at the NASD, when asked, advised SunTrust's compliance department that the NASD would not accept an altered form. *Id.* at 26a. Though she had executed the Form U-4 in its entirety on several occasions in the past, JA 73-102, Desiderio this time refused to submit an unaltered Form U-4, and SunTrust revoked its offer of employment because Desiderio did not become registered with the NASD. Pet. App. 26a. Desiderio's altered Form U-4 was never actually submitted to the NASD

for approval, and Desiderio never directly contacted the NASD.

On January 13, 1997, Desiderio brought suit in the United States District Court for the Southern District of New York against the NASD and the SEC for declaratory judgment invalidating the mandatory arbitration clause in the Form U-4, on the grounds that it violated her rights under Title VII, 42 U.S.C. §§ 2000e *et seq.*, and the United States Constitution. Pet. App. 2a. The complaint also sought damages under pendent state law claims of tortious interference with employment and negligent infliction of emotional distress. *Id.* Desiderio did not allege that she actually had any dispute with an employer that would be subject to mandatory arbitration under the Form U-4.

The district court granted defendants' motions to dismiss Desiderio's complaint for failure to state a claim. Pet. App. 26a-34a. Relying on *Gilmer v. Interstate/Johnson-Lane Corp.*, 500 U.S. 20 (1991), in which this Court approved mandatory arbitration of ADEA claims under the Form U-4, the district court rejected Desiderio's Title VII and constitutional claims. *Id.* at 27a-31a. The district court also held that the NASD is not a state actor and consequently could not violate Desiderio's constitutional rights. *Id.* at 27a. Desiderio's state law claims against the NASD and all of her claims against the SEC were dismissed on grounds not relevant here. *Id.* at 32a-34a.

Petitioner appealed from the judgment only as against the NASD. The Second Circuit affirmed. The appellate court, like the district court, held that *Gilmer* disposed of Desiderio's Title VII claim. Following *Gilmer*, the court reasoned that mandatory arbitration of Title VII complaints would be permissible unless Congress had manifested an intent to preclude waiver of judicial remedies with respect to Title VII. Pet. App. 10a (quoting *Gilmer*, 500 U.S. at 26).

Finding no such intent, the court held – in accord with prior decisions from ten other circuits – that mandatory arbitration of Title VII claims was consistent with that statute. *Id.* at 7a-8a, 11a-14a. The Second Circuit then turned to Desiderio's claims that the NASD's mandatory arbitration rule violated the Constitution and, specifically, her Fifth Amendment due process rights, Seventh Amendment right to jury trial, and Article III rights to a judicial forum. *Id.* at 15a. Those claims were foreclosed, the court held, by an absence of state action. *Id.* Applying the state action standard set out in *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Second Circuit concluded that because the SEC had neither required nor encouraged the NASD's mandatory arbitration rule, that rule was not "fairly attributable" to the government. *Id.* at 16a-18a.

REASONS FOR DENYING THE PETITION

Petitioner barely acknowledges, let alone addresses, what is now the most important aspect of this case: since January 1, 1999, *no* NASD rule has required arbitration of Title VII claims, or any other statutory discrimination claims. Moreover, the NASD has adopted new arbitration procedures for statutory discrimination claims, effective January 18, 2000, that directly address many of petitioner's specific objections to NASD arbitration. In light of these changes, Desiderio's claim – that the NASD could not, in 1996, require arbitration of Title VII claims because its then-governing procedures were insufficient to protect statutory rights – is not appropriate for review by this Court.

Even if Desiderio's claims had some continuing legal significance, they would not merit review by this Court. The Court already has held that statutory claims, including statutory discrimination claims, generally are subject to mandatory arbitration agreements, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and the Second Circuit's

decision in this case is a straightforward application of that rule. The NASD's arbitration procedures, even before the recent amendments, provided employees with a full and fair opportunity to present their claims. Contrary to petitioner's assertions, there is no conflict among the federal circuits on either the adequacy of NASD arbitration procedures or the fact that NASD arbitration rules are not attributable to the government for constitutional purposes. Nothing about this case requires the Court's attention.

I. PETITIONER'S TITLE VII CLAIM IS BOTH MERITLESS AND WITHOUT ANY PROSPECTIVE LEGAL SIGNIFICANCE.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court approved the very same Form U-4 mandatory arbitration clause to which Desiderio objected here. Relying on the "liberal federal policy favoring arbitration agreements" reflected in the Federal Arbitration Act ("FAA"), *id.* at 25 (internal quotation omitted), the Court held that statutory claims, including statutory discrimination claims, generally are subject to predispute arbitration agreements. *Id.* at 26; *see also Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 75-77 (1998) (raising but not deciding question whether *Gilmer* applies to union-negotiated arbitration clauses as well as to individually executed arbitration agreements, such as Form U-4). Because Gilmer could not meet his burden of showing that Congress intended to preclude arbitration when it passed the Age Discrimination in Employment Act ("ADEA"), 500 U.S. at 26, he was bound under the FAA by his Form U-4 agreement to arbitrate his ADEA complaint.

Gilmer appears to foreclose Desiderio's claim that mandatory arbitration of Title VII disputes under the Form U-4 would violate her rights under that statute. In an effort to avoid this conclusion and distinguish *Gilmer*, Desiderio ar-

gues that the NASD's specific arbitration practices – unlike the New York Stock Exchange arbitration procedures at issue in *Gilmer* – inadequately protect Title VII statutory rights, and are thus inconsistent with that statute. Pet. 4-15.[5]

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[5] Desiderio does *not* argue in her petition that her case is distinguishable from *Gilmer* on the ground that *Gilmer* upheld arbitration of ADEA claims rather than Title VII claims. This may be in recognition of the fact that the Second Circuit, in the decision below, became the eleventh federal court of appeals to reject this argument and hold that Title VII claims are subject to predispute arbitration agreements under *Gilmer*. Though there is one federal circuit court decision to the contrary, the law on this question is sufficiently well-settled that this Court has several times denied *certiorari* in cases raising the issue. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999) (Title VII claims subject to predispute arbitration agreement); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3rd Cir. 1998) (same), *cert. denied*, 525 U.S. 1139 (1999); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.) (same), *cert. denied*, 519 U.S. 980 (1996); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (same); *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998) (same); *Cosgrove v. Shearson Lehman Brothers*, 105 F.3d 659 (6th Cir.) (same), *cert. denied*, 522 U.S. 864 (1997); *Koveleskie v. SBC Capital Mkts. Inc.*, 167 F.3d 361 (7th Cir.) (same), *cert. denied*, 120 S. Ct. 44 (1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (same); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (same); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (same); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (same); *but see Duffield v. Roberston Stephens & Co.*, 144 F.3d 1182 (9th Cir.) (Title VII claims not subject to predispute arbitration agreement), *cert. denied*, 119 S. Ct. 445 (1998). For whatever reason, petitioner decided not to press the argument in her petition for certiorari, and it is now waived. *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192,

This claim is without merit. The Court in *Gilmer* approved arbitration of statutory discrimination complaints under procedures either substantially similar to or *less* employee-protective than the NASD's own arbitration procedures. Perhaps more important here, Desiderio's "fact-based challenge to the adequacy of the NASD arbitration scheme as it operate[d] in actual practice," Pet. 4, is of no prospective legal importance at all, as the NASD no longer requires arbitration of Title VII claims and has in any event implemented new rules to govern its arbitration proceedings.

A. The Title VII Issue Raised by Petitioner Has No Prospective Importance.

The main argument advanced by Desiderio, in the courts below as well as before this Court, is a Title VII argument: according to Desiderio, mandatory arbitration of Title VII claims under NASD rules and procedures deprives claimants of substantive rights under Title VII and is thus inconsistent with that statute. *See, e.g.*, Pet. 3 (describing complaint); *id.* at 4-15 (arguments under Title VII); *id.* at 23 (constitutional arguments tied to statutory claims). What this case is about is mandatory arbitration of Title VII claims and, more specifically, mandatory arbitration of Title VII claims under the NASD's own arbitration rules and procedures. Pet. 4. But NASD rules no longer provide for mandatory arbitration of Title VII claims, or of any other statutory discrimination claims. Accordingly, Desiderio's NASD-specific challenge to arbitration of Title VII claims has no continuing legal significance.

The NASD's current rule on arbitration, approved by the SEC in 1998, expressly excepts claims alleging employment discrimination in violation of statute – including, obviously,

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206-08 (1997) (statutory argument made in court of appeals waived by failure to include in certiorari petition).

Title VII – from the NASD's mandatory arbitration requirement. *See supra* at 4. Under the current rule, potential employees like Desiderio need not, as a condition of registration with the NASD, agree in advance to arbitrate Title VII claims at the insistence of their employers. Instead, NASD rules provide for arbitration of Title VII claims only if both parties to the dispute – employer *and employee* – agree on that course of action, either before or after the dispute arises. 63 Fed. Reg. at 35302-03. There is, in short, no mandatory arbitration of Title VII claims under governing NASD rules.[6]

Nor does the NASD's prior approach to arbitration of Title VII claims have significant ongoing effects on pending claims. The current rule applies not, as petitioner suggests, only to Title VII claims "arising" after January 1, 1999, *see* Pet. 2 n.1, but to all Title VII claims *filed* on or after January 1, 1999, regardless of whether the underlying conduct giving rise to the claim occurred before that date. 63 Fed. Reg. at 35301 & n.27. The old rule on arbitration of Title VII claims, that is, applies only to pending claims filed before January 1, 1999.

The NASD continues to believe that arbitration of employment-related disputes brings substantial advantages in terms of speed and cost, and that arbitration's "essentially equitable approach to dispute resolution is fully capable of vindicating the important public rights expressed in anti-discrimination statutes." *Id.* at 35301 n.22 (quoting NASD Arbitration Policy Task Force). The NASD expects that

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[6] The NASD rule on mandatory arbitration covers only the NASD's own registration requirements, and does not affect the right of securities firms to include broader arbitration provisions in their own employment agreements. But Desiderio's objection is to mandatory arbitration of Title VII claims as required and implemented by the NASD, and the NASD requirement no longer exists.

some employment discrimination claims will continue to be submitted to arbitration in the NASD forum. Those claims will be governed by the new procedures for employment discrimination claims recently adopted by the NASD and approved by the SEC, described *supra* at 6-7.

The question posed by Desiderio's certiorari petition is whether NASD arbitration procedures in 1996 – when Desiderio refused to sign the Form U-4 – were adequate to protect substantive Title VII rights, so that the NASD could require arbitration of Title VII claims under *Gilmer*. The answer to this question is yes, as discussed below. But it is also irrelevant. Since Desiderio brought her lawsuit in 1997, the NASD has both excepted Title VII claims from its mandatory arbitration requirement[7] and revised its arbitration procedures in ways that are directly applicable to Desiderio's claims. Desiderio's self-described "fact-specific challenge to the adequacy of NASD's mandatory arbitration procedures"

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[7] The New York Stock Exchange ("NYSE") followed the NASD's lead and excepted statutory discrimination claims from its mandatory arbitration rule in September 1998. *See* Exchange Act Rel. No. 34-40479, 63 Fed. Reg. 52782 (1998). Combined, the NASD and the NYSE arbitrate the vast majority of employment claims in the securities industry. Several smaller exchanges also have amended their rules so that mandatory arbitration of statutory discrimination claims is no longer required. *See* Exchange Act Rel. No. 34-40861, 64 Fed. Reg. 1039 (1999) (Boston Stock Exchange); Exchange Act Rel. No. 34-40873, 64 Fed. Reg. 1253 (1999) (Chicago Stock Exchange); Exchange Act Rel. No. 34-41080, 64 Fed. Reg. 10033 (1999) (Chicago Board Options Exchange). Even if petitioner's argument extended to mandatory arbitration of Title VII claims by securities exchanges as a whole, rather than focusing specifically and exclusively on the "actual practice" of the NASD system, Pet. 4, the general move away from mandatory arbitration of Title VII claims by securities exchanges would deprive the argument of any broad significance.

for Title VII claims, Pet. 4, is a challenge of no general prospective importance.[8]

B. Petitioner's Title VII Claim Is Meritless and Implicates No Circuit Court Conflict.

1. Even if it were still relevant, Desiderio's argument that the NASD's prior arbitration procedures and practices inadequately protected Title VII statutory rights would be unavailing. In *Gilmer*, the Court rejected a similar claim that arbitration under the rules of the NYSE provided an inadequate forum for ADEA claims because it did not provide all of the same procedural protections as resolution by judicial forum: "Although [the NYSE] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 500 U.S. at 31 (internal quotation omitted).

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[8] Desiderio acknowledges one of the NASD's two new rules – the rule exempting statutory discrimination claims from the mandatory arbitration requirement – in a footnote, but responds that the change came "too late to benefit petitioner." Pet. 2 n.1. There is no suggestion, however, that review of Desiderio's claim might have some more general prospective relevance for future litigants or cases. And if the inquiry is limited to petitioner's own individual circumstances, then it is noteworthy that Desiderio herself did not actually *need* the benefit of the new rule. Desiderio's prospective employer was apparently willing to forgo arbitration of employment disputes, Pet. 2, and the NASD arbitration rule effective in 1996 required arbitration only "at the instance" of a party to a dispute. JA 43. Desiderio and her employer were thus entirely free to "bargain around" mandatory arbitration, as petitioner herself emphasized in briefing before the Second Circuit. *See* Brief of Plaintiff-Appellant at 14 ("mandatory arbitration provision in the Form U-4 could be readily circumvented by a side agreement" between Desiderio and her prospective employer).

The NASD's former arbitration procedures were no less employee-protective, and in some instances more employee-protective, than those approved by the Court in *Gilmer*, and thus raise no question as to adequacy.

With respect to concerns about the "demographic characteristics of NASD arbitrators," Pet. 6, for instance, NASD rules provided all of the same protections against bias as the NYSE rules deemed sufficient in *Gilmer*, 500 U.S. at 30: parties were informed of arbitrators' employment histories for the past 10 years, arbitrators were under a duty to disclose any circumstances which might preclude an impartial and objective decision, and each party was allowed one peremptory challenge and unlimited challenges for cause. But 1996 NASD procedures went even further than the NYSE rules approved in *Gilmer*, and provided also that employment discrimination claims would be heard only by panels on which a majority of arbitrators were "non-industry," neither employed by nor affiliated with the securities industry. *See supra* at 5.[9] NASD's more employee-protective measures against arbitrator bias are more than adequate under *Gilmer*.

Gilmer similarly disposes of most of Desiderio's other objections. Like Desiderio in this case, Gilmer complained that under the NYSE arbitration scheme, at least in practice, discovery was limited, arbitrators failed to issue written opinions, and meaningful judicial review was precluded. *See* 500 U.S. at 31-32 & n.4; Pet. 6, 12-13. This Court held the NYSE arbitration procedures adequate despite these alleged shortcomings. Limited discovery, the Court concluded, was offset by gains in simplicity and informality. 500 U.S. at 31. The fact that NYSE rules – like NASD rules, *see* Rule

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[9] As already discussed, this NASD rule has since been replaced by one requiring that *all* arbitrators hearing employment discrimination claims be "non-industry." *Supra* at 6.

10330(a), JA 58 – require arbitrators to summarize issues in controversy and describe awards issued was sufficient to preserve appellate review. *Id.* at 31-32.[10] And though "judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Id.* at 32 n.4 (internal quotation omitted).

The few of petitioner's complaints that have not been squarely rejected already by *Gilmer* are equally without merit. Desiderio makes much, for instance, of the allegation that NASD arbitrators are instructed in their manual that they are not "strictly bound" by case precedent or statutory law. *Koveleskie v. SBC Capital Markets*, 167 F.3d 361, 365 (7th Cir.) *cert. denied*, 120 S. Ct. 44 (1999); Pet. 8-10. But that is not the same as saying that arbitrators should not follow the law, and arbitrators are "also told that if they manifestly disregard the law, the award may be vacated." 167 F.3d at 365 (internal quotation omitted) (rejecting "as-applied" challenge to securities industry arbitration procedures under *Gilmer*). Petitioner also alleges that NASD arbitrators impose substantial "forum fees" on Title VII plaintiffs. Pet. 10-12. But most of the expenses of the NASD arbitration program are borne by employers, not employees. *See* Exchange Act Rel. No. 34-39346 (1997) (proposed amendment to NASD arbitration fees discussing fee allocation); *see also Koveleskie*, 167 F.3d at 366; *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1483 (D.C. Cir. 1997); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 15-16 (1st Cir. 1999). Moreover, the Director of Arbitration has the authority to waive any fees that otherwise would be imposed on

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[10] Again, the NASD has since revised its procedures governing both discovery and the content of arbitral awards in a manner that addresses Desiderio's objections. *See supra* at 6-7.

employees in cases of financial hardship. Rule 10332(a), JA 59.

2. There is no disagreement in the lower courts as to whether the NASD's arbitration procedures and practices are adequate, under *Gilmer*, to protect the Title VII rights of claimants. The court below rejected Desiderio's Title VII claim without even reaching this argument, and no other circuit court has ever concluded that the arbitration procedures of NASD, or any other securities exchange, provide inadequate protection for statutory rights. On the contrary, the law on this issue is entirely uniform: both circuit courts that considered "as applied" challenges to securities industry arbitration procedures under *Gilmer* rejected them. *See Koveleskie*, 167 F.3d at 365-366; *Rosenberg*, 170 F.3d at 14-16.

Nor, contrary to petitioner's assertion, is there a conflict in the courts of appeals on the more general issue of the permissibility of "substantial filing and forum fees" charged to claimants. Pet. 13-15. It is true that some courts, in cases arising outside the securities industry, have disapproved of arbitration procedures or agreements that impose high forum costs on employee-claimants. *See Cole*, 105 F.3d at 1483-85; *Paladino v. Avent Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230, 1233 (10th Cir. 1999). But petitioner cites no case that has *approved* the imposition of substantial forum costs on employees, and thus there is no conflict. Though petitioner suggests otherwise, Pet. 14, the court below did not even address, let alone decide, this question.[11] The other cases relied on by petitioner enforce arbitration agreements against forum-cost claims like Desiderio's on the express understanding that employees in

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[11] Nor does the Third Circuit in *Seus v. John Nuveen & Co.*, 146 F.3d 175 (1998), *cert. denied*, 119 S. Ct. 1028 (1999), also relied on by petitioner, Pet. 14, discuss the question of forum fees.

those cases were *not* required to bear forum fees, and leave open the possibility of a challenge if unreasonable fees are in fact imposed on a particular employee. *Rosenberg*, 170 F.3d at 15-16; *Koveleskie*, 167 F.3d at 366. Petitioner's claim of conflict boils down to this: some courts have suggested that charging forum costs to employees might be problematic, and others – directly on point – have found that any such problem is not implicated *in the securities industry*. *See Rosenberg*, 170 F.3d at 16; *Koveleskie*, 167 F.3d at 366. There is no disagreement as to the underlying law here, and no need for this Court's review.

II. THERE IS NO CIRCUIT CONFLICT ON WHETHER THE NASD'S ARBITRATION REQUIREMENT IS ATTRIBUTABLE TO STATE ACTION.

The Second Circuit correctly held that Desiderio's constitutional claims fail for want of the requisite state action. Pet. App. 15a. Desiderio's constitutional challenge is to the mandatory arbitration requirement of the NASD. Pet. 16. But the decision of NASD to require arbitration of certain employment claims – now excepting statutory discrimination claims, in any event – does not constitute government action, and no court has ever held to the contrary.

It is clear, as the Second Circuit held, that the NASD is itself a private entity rather than a state actor, Pet. App. 15a, and petitioner does not appear to dispute this point. Instead, petitioner argues, Pet. 16, that the NASD's decision to require arbitration of certain claims should nevertheless be held to constitutional limits under the standard set out in *Blum v. Yaretsky*: where "there is a sufficiently close nexus between the State and the challenged action of the [private] entity [] the action of the latter may be fairly treated as that of the State itself." 457 U.S. 991, 1004 (1982) (internal quo-

tation omitted). But that standard, as the Second Circuit held, Pet. App. 16a-18a, cannot be met here.

Blum's "close nexus" requires that the state be "responsible for the *specific* conduct of which the plaintiff complains," 457 U.S. at 1004 (emphasis shifted), and "there is nothing in the [Securities Exchange Act of 1934] and [] no Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 135 (1973). Nor has the SEC, through rule or informal action, encouraged or prompted the NASD to require arbitration. Pet. App. 16a-17a; *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir.), *cert. denied*, 119 S. Ct. 445 (1998). Finally, the fact that the SEC approves and oversees the NASD's rules, including its mandatory arbitration rule, Pet. 18-19, falls far short of establishing state action. As this Court held in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50, 357 (1974), even where the state engages in "extensive and detailed" regulation and oversight of a private entity, the state's failure to disapprove of a proposed action by the regulated entity does not make that action attributable to the government. *See Duffield*, 144 F.3d at 1202 (relying on *Jackson* to find absence of state action with respect to NASD rules).

In *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368, *cert. denied*, 120 S. Ct. 44 (1999), the Seventh Circuit recently came to the same conclusion as the court below, rejecting on state action grounds precisely the same constitutional challenge to the NASD arbitration requirement as raised here.[12] The decision below also is consistent with a

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[12] The Seventh Circuit went on to conclude that even apart from the absence of state action, Koveleskie's constitutional claims – the same claims as raised by Desiderio here – were en-

long line of cases from the lower courts holding that the conduct of the NASD – in its regulatory capacity or as operator of an arbitration forum – does not constitute state action.[13] And contrary to petitioner's contention, Pet. 17-18, the Second Circuit's decision is not in conflict with any decision of another court of appeals.

Duffield is the only case petitioner relies on for the purported conflict that actually involves the status of the NASD. But in *Duffield*, the Ninth Circuit *rejected* the plaintiff's constitutional claims against mandatory arbitration under the Form U-4 on the ground that the mandatory arbitration requirements of the NASD and NYSE are *not* "fairly attributable" to the state. 144 F.3d at 1200. The court did suggest that after issuance of a 1993 SEC regulation, the requirement that new employees register with an exchange was a matter of law and thus attributable to the state. *Id.* at 1201. Be-

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tirely without merit. 167 F.3d at 368-69 (addressing and rejecting Article III, Seventh Amendment, and Fifth Amendment claims).

[13] *See, e.g., First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 698, 699 n.5 (3rd Cir. 1979) (no state action in regulatory capacity), *cert. denied*, 444 U.S. 1074 (1980); *Datek Secs. Corp. v. NASD*, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (same); *United States v. Bloom*, 450 F. Supp. 323, 329-30 (E.D. Pa. 1978) (same); *Shrader v. NASD*, 855 F. Supp. 122, 124 (E.D.N.C. 1994) (no state action as sponsor of arbitration forum), *aff'd without opinion*, 54 F.3d 774 (4th Cir. 1995); *Graman v. NASD*, No. Civ. A. 97-1556-JR, 1998 WL 294022 (D.D.C. Apr. 27, 1998) (same); *Bahr v. NASD*, 763 F. Supp. 584, 588-89 (S.D. Fla. 1991) (same); *First Heritage Corp. v. NASD*, 785 F. Supp. 1250, 1251 (E.D. Mich. 1992) (same); *see also United States v. Solomon*, 509 F.2d 863, 867-71 (2d Cir. 1975) (NYSE not state actor for purposes of Fifth Amendment claim); *Davis v. Prudential Securities Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (agreeing with numerous courts that "state action element of a due process claim is absent in private arbitration cases" generally).

cause the events at issue in *Duffield* occurred before 1993, as the court recognized, *id.* at 1200-01, this portion of the opinion is dicta. More important, whether or not the Ninth Circuit's understanding of the registration requirement is correct, it does not resolve the issue here. Desiderio is not challenging the requirement that she register with the NASD, but the NASD's mandatory arbitration requirement. And as the Ninth Circuit went on to find – consistent with the decision below – there is no "nexus" between the government and the mandatory arbitration requirement, the "specific conduct" being challenged here. *Blum*, 457 U.S. at 1004; *Duffield*, 144 F.3d at 1201-02. The absence of a "nexus" under *Blum* is dispositive; even if the government required registration, arguably giving the securities exchanges a kind of "monopoly power" to enforce their rules against employees, that would not by itself transform those rules into products of government action. *See Jackson*, 419 U.S. at 351-52 (fact that state gives private entity monopoly power over consumers does not make entity's exercise of that power attributable to state); *see also Graman v. NASD*, 1998 WL 294022, *3 (D.D.C. 1998) (NASD rules not attributable to state in part because "existence of an effective private monopoly does not create governmental action").

The other cases cited by petitioner for a "conflict" concern not the NASD, but different regulatory entities governed by different statutes and operating in different contexts. That they come to different results is the natural result of a fact-specific state action standard, *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982), and reflects no disagreement as to underlying legal principles. *Blount v. SEC*, 61 F.3d 938, 941 (D.C. Cir. 1995), for instance, holds that rules of the Municipal Securities Rulemaking Board ("MSRB"), approved (like NASD rules) by the SEC, constitute government action. But the MSRB, unlike the NASD, was created by an act of Congress and directed by Congress

to "propose and adopt rules to effect the purposes of the [Securities Exchange Act]" within narrow constraints. *Id.* All MSRB board members, unlike NASD board members, initially were appointed by the government. 15 U.S.C. §78o-4(b)(1). This is enough, as the D.C. Circuit suggested without deciding, 61 F.3d at 941, to make the MSRB a government actor, and to render superfluous the question whether its actions are otherwise "attributable" to the state under *Blum*. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383-86, 378 (1995) (Amtrak is government actor because government created Amtrak by statute for governmental purposes and reserves authority to appoint majority of directors; accordingly, no need to reach "attribution" theory of state action).[14]

Petitioner also relies on the Seventh Circuit case of *R.J. O'Brien & Associates, Inc. v. Pipkin*, 64 F.3d 257 (1995). But the Seventh Circuit, as noted above, recently decided precisely the question at issue here – the status of the NASD's arbitration rule – in accord with the decision below and without mentioning *O'Brien*, *see Koveleskie*, 167 F.3d at 368, clearly demonstrating that *O'Brien* has no bearing on this case. *O'Brien* concerns the status of a registration form used by the National Futures Association ("NFA") pursuant to the Commodities Exchange Act ("CEA"). The CEA, which arose from a distinct economic system involving the sale of agricultural products, does not mirror the Exchange Act, under which the NASD operates. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356-362 (1982). Most important here, the CEA, unlike the Exchange Act, specifically delegates to futures associations such as the

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[14] Moreover, the NASD, unlike Amtrak, receives no federal or state funding. *Compare Lebron v. Nat'l R.R. Passenger Corp.*, 12 F.3d 388, 391 (2d Cir. 1993) (Amtrak operations financed by federal government), *rev'd on other grounds*, 513 U.S. 374 (1995).

NFA the function of registering commodities professionals, and it was this statutory delegation on which the Seventh Circuit relied for its finding of state action in *O'Brien*. 64 F.3d at 262.[15]

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[15] Resolution of the state action question in *Brentwood Academy v. Tennessee Secondary Schools Athletic Assoc.*, 180 F.3d 758 (6th Cir. 1999), on which the Court recently granted *certiorari*, No. 99-901, 2000 WL 197387 (Feb. 22, 2000), is unlikely to have any bearing on this case. *Brentwood Academy*, which involves the status of a secondary school athletic association, turns in large part on the fact that the athletic association in question is composed of and exclusively governed by public entities and public officials. The principal question for the Court is the significance to be accorded that fact under *NCAA v. Tarkanian*, 488 U.S. 179 (1988), and especially footnote 13 of that opinion. *See* Petition for Writ of Certiorari i (Question Presented); *id.* at 2-3, 17-18, 19-25. The NASD is neither composed of nor governed by public officials, and the proper application of the *NCAA* case to secondary school athletic associations has no direct connection to this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

The amendments to the NASD arbitration procedure for employment discrimination claims, effective January 18, 2000, provide in relevant part as follows:

10200. INDUSTRY AND CLEARING CONTROVERSIES

10202. Composition of Panels

(a) In disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions, the panel of arbitrators shall be appointed as provided by paragraph (b)(1) or (2) or Rule 10203, whichever is applicable. In all other disputes arising out of the employment or termination of employment of an associated person, the panel of arbitrators shall be appointed as provided by Rule 10212, 10302 or 10308, whichever is applicable.

* * *

10210. Statutory Employment Discrimination Claims

The Rule 10210 Series shall apply only to disputes that include a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute. The Rule 10210 Series shall supersede any inconsistent Rules contained in this Code.

10211. Special Arbitrator Qualifications for Employment Discrimination Disputes

(a) Minimum Qualifications for All Arbitrators

Only arbitrators classified as public arbitrators as provided in Rule 10308 shall be selected to consider disputes involving a claim of employment discrimination, including a sexual harassment claim, in violation of a statute.

(b) Single Arbitrators or Chairs of Three-Person Panels

(1) Arbitrators who are selected to serve as single arbitrators or as chairs of three-person panels should have the following additional qualifications:

(A) law degree (Juris Doctor or equivalent);

(B) membership in the Bar of any jurisdiction;

(C) substantial familiarity with employment law; and

(D) ten or more years of legal experience, of which at least five years must be in either;

(i) law practice;

(ii) law school teaching;

(iii) government enforcement of equal employment opportunity statutes;

(iv) experience as a judge, arbitrator, or mediator; or

(v) experience as an equal employment opportunity officer or in-house counsel of a corporation

(2) In addition, a chair or single arbitrator with the above experience may not have represented primarily the views of employers or of employees within the last five years. For purposes of this Rule, the term "primarily" shall be interpreted to mean 50% or more of the arbitrator's business or professional activities within the last five years.

(c) Waiver of Special Qualifications

If all parties agree, after a dispute arises, they may waive any of the qualifications set forth in paragraph (a) or (b) above.

10212. Composition of Panels

For disputes involving a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute;

(a) Each panel shall consist of either a single public arbitrator or three public arbitrators qualified under Rule 10211, unless the parties agree to a different panel composition.

(b) A single arbitrator shall be appointed to hear claims for $100,000 or less.

(c) A panel of three arbitrators shall be appointed to hear claims for more than $100,000, unless the parties agree to have their case determined by a single arbitrator.

10213. Discovery

(a) Necessary pre-hearing depositions consistent with the expedited nature of arbitration shall be available.

(b) The provisions of Rule 10321 shall apply to proceedings under this Rule 10210 Series.

10214. Awards

The arbitrator(s) shall be empowered to award any relief that would be available in court under the law. The arbitrator(s) shall issue an award setting forth a summary of the issues, including the type(s) of dispute(s), the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

10215. Attorneys' Fees

The arbitrator(s) shall have the authority to provide for reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable.

10216. Coordination of Claims Filed in Court and in Arbitration

(a) Option to Combine Related Claims in Court

(1) (A) If a current or former associated person of a member files a statutory discrimination claim in court against a member or its associated persons, and asserts related claims in arbitration at the Association against some or all of the same parties, a respondent who is named in both proceedings shall have the option to move to compel the claimant to bring the related arbitration claims in the same court proceeding in which the statutory discrimination claim is pending, to the full extent to which the court will accept jurisdiction over the related claims.

(B) The respondent shall notify the claimant in writing, before the time to answer under Rule 10314 has expired, that it is exercising this option and shall file a copy of such notification with the Director. If the respondent files an answer without having exercised this option, it shall have waived its right to move to compel the claimant to assert related claims in court, except as provided in paragraph (b).

(2) (A) If a member or current or former associated person of a member ("party") has a pending claim in arbitration against a current or former associated person of a member and the current or former associated person thereafter asserts a related statutory employment discrimination claim in court against the party,

the party shall have the option to assert its pending arbitration claims and any counterclaims in court.

(B) The party shall notify the current or former associated person in writing, before filing an answer to the complaint in court, that it is exercising this option and shall file a copy of such notification with the Director, if the party files and answer in court without having exercised this option, it shall have waived its right to assert the pending arbitration claim in court.

(C) The party may not exercise this option after the first hearing has begun on the arbitration claim.

(b) Option Extended When Claim is Amended

(1) If the claimant flies an amended Statement of Claim adding new claims not asserted in the original Statement of Claim, a respondent named in the amended Statement of Claim shall have the right to move to compel the claimant to assert all related claims in the same court proceeding in which the statutory discrimination claim is pending, to the full extent that the court will accept jurisdiction over the related claims, even if those related claims were asserted in the original Statement of Claim.

(2) The respondent shall notify the claimant in writing, before the time to answer the amended Statement of Claim under Rule 10314 has expired, that it is exercising this option and shall file a copy of such notification with the Director, if the respondent files an answer to the amended Statement of Claim without having exercised this option, it shall have waived its right to move to compel the claimant to assert related claims in court.

(c) Requirement to Combine All Related Claims

If a party elects to require a current or former associated person to assert all related claims in court, the party shall assert in the same court proceeding all related claims that it has

against the associated person to the full extent to which the court will accept jurisdiction over the related claims.

(d) Right of Respondent to Remain in Arbitration

(1) If there are multiple respondents and a respondent has exercised an option under paragraph (a) or (b), but another respondent wishes to have the claims against it remain in arbitration, then any remaining party may apply for a stay of the arbitration proceeding.

(2) The arbitration shall be stayed unless the arbitration panel determines that the stay will result in substantial prejudice to one or more of the parties. If a panel has not been appointed, the Director shall appoint a single arbitrator to consider the application for a stay. Such single arbitrator shall be selected using the Neutral List Selection System (as defined in Rule 10308) and is not required to have the special employment arbitrator qualifications described in Rule 10211.

(e) Pre-Filing Certification

(1) Prior to or concurrently with filing a Statement of Claim, a claimant may file with the Director a certification that it had communicated unsuccessfully with the respondent concerning the consolidation of all claims in court prior to filing a Statement of Claim, in an effort to save the expense of arbitration fees. A copy of such certification shall be sent to the respondent at the same time and in the same manner as the filing with the Director.

(2) If, after a certification has been filed, all the respondents later exercise the option to consolidate all claims in court, the Director will return the claimant's filing fee and any hearing session deposits for hearings that have not been held, but will retain the member surcharge and any accrued member process fees. If there are any remaining respondents, the filing fee and any hearing de-

posits will be adjusted to correspond to the claims against the remaining respondents.

(f) Motion to Compel Arbitration

If a member or a current or former associated person of a member files in court a claim against a member or a current or former associated person of a member that includes matter that are subjected to mandatory arbitration, either by the rules of the Association or by private agreement, the defending party may move to compel arbitration of the claims that are subject to mandatory arbitration.

(g) Definitions

For purposes of this Rule;

(1) The term "related claim" shall mean any claim that arises out of the employment or termination of employment of an associated person.

(2) The term "statutory discrimination claim" means a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute.

* * *